80-1819

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SWISSVALE AREA SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

DOROTHY HOOTS, *et al.*, and
COMMONWEALTH OF PENNSYLVANIA, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In a school desegregation action, filed a decade ago, where the district court had failed to order any relief after finding a constitutional violation 7 1/2 years ago:

1. Whether the court of appeals abused its discretion by ordering the district court to formulate a desegregation plan within 90 days, and the district court in fact has complied with the order.

2. Whether the district court's denial of a motion for injunctive relief for the upcoming year was appealable as the denial of an injunction pursuant to 28 U.S.C. § 1292(a)(1).

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No. 80-441

IN THE

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October Term, 1980

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SWISSVALE AREA SCHOOL DISTRICT, et al.,

Petitioners,

v.

DOROTHY HOOTS, et al., and COMMONWEALTH OF PENNSYLVANIA, et al.

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On Petition for a Writ of Certiorari to The United States Court of Appeals For The Third Circuit

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BRIEF IN OPPOSITION

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Statement

The controversy is moot.

This school desegregation action was filed on June 9, 1971 by plaintiff parents of school children attending the General

Braddock Area School district who charged that in preparing and adopting school reorganization plans for Allegheny County, Pennsylvania, the State intentionally and knowingly created racially segregated school districts. On May 15, 1973, the district court found that the State's creation of General Braddock was "an act of de jure discrimination in violation of the Fourteenth Amendment." 359 F. Supp. 807, 823 (W.D. Pa. 1973). Since 1973, no relief has been ordered despite numerous proceedings in the district court and the court of appeals (See, A. 3a, n.1).

The appeal below was taken from the district court's order of July 30, 1980 denying plaintiffs' immediate relief in the form of a merger or consolidation plan and implementation of relief by school

year 1980-81 (A. ii). The denial was stated to be "without prejudice," but, as the court of appeals found, "the effect of the denial was to preclude any possibility of granting the relief sought" (A. 13a).

On January 26, 1981, the court below vacated the July 30, 1980 order and remanded for further proceedings. The court ordered "the district court to expedite its consideration of this case so that within ninety days of the issuance of the mandate of this court it shall:

> "1) complete all hearings and necessary proceedings on the merits of the competing remedial plans for the desegregation of GBASD;
>
> "2) decide the Milliken v. Bradley[, 418 U.S. 717 (1974)] issue of which school districts may be included within an interdistrict remedy; and
>
> "3) enter an appropriate final order granting appellants the relief to which they are entitled under the district court's order of

> May 15, 1973, such relief to be effective and implemented by the beginning of the first semester of the school year in the fall of 1981."

(A. 16a).*/

The mandate was issued January 26, 1981. A petition for rehearing was filed by four of the eight defendant school districts (Churchill, Edgewood, Swissvale and Turtle Creek), and denied February 25th (A. 54a). A motion for a stay was denied by the Third Circuit on March 13th and by Justice Brennan, as Circuit Justice, on March 24th.

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*/ The court below was unanimous on the appealability of the order as a denial of an injunction, 28 U.S.C. § 1292(a), and on the need for expedited relief. Judge Garth agreed that the court had jurisdiction and that "this protracted litigation should be completed as speedily as possible and thus should be accorded the very highest priority" (A. 32a), but dissented on the need for the 90 day deadline (A. 34a).

Upon the issuance of the mandate, the district determined the remedy (A. 75a). On March 5, 1981, the court resolved the Milliken v. Bradley, supra, issue and held that the surrounding Churchill, Turtle Creek, Swissvale, East Allegheny, Edgewood, and Gateway districts may be included in any remedy (A. 58a). On April 6, 1981, the court rejected plans that would merely upgrade the facilities of the General Braddock, and that would provide for the closing of General Braddock schools and the education of children in surrounding districts, as ineffective and infeasible. On April 28th, the court determined that the present school districts of Churchill, Edgewood, Swissvale, General Braddock, and Turtle Creek should be consolidated, and issued a final order with guidelines for a desegregation plan to be implemented fall 1981. Thus

the district court has complied with the mandate.*/

The instant petition for a writ of certiorari by the Churchill, Edgewood, Turtle Creek and Swissvale school districts to review the January 26, 1981 Third Circuit opinion is filed at the end of the 90 day period of hearings and orders mandated by the court of appeals and complied with by the district court. State defendants do not seek review.

REASONS FOR DENYING THE WRIT

The opinion below presents no important questions, and is entirely consistent with the opinions of this Court and other courts of appeals. The issues presented are moot.

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*/ A separate appeal has been filed by the four districts from the April 28th order, which is not before the Court. That appeal is pending in the Third Circuit.

1. The mandate of the court of appeals has been dutifully complied with by the district court within the 90 day period. Remedial hearings have been held, and the appropriate orders issued. The controversy is moot. There is no need for review.

2. The mandate of the Third Circuit, in any event, was well within the "breadth and flexibility ... inherent in equitable remedies" in school desegregation litigation. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S 1, 15 (1971). The Court of Appeals had acquired substantial experience with the litigation over the course of five appeals or writs for mandamus (See, A. 3a, n.1).

The 90 day deadline was plainly consistent with the constitutional duty to

desegregate "now," Columbus Board of Education v. Penick, 443 U.S. 449, 459 (1979), quoting Swann, supra, 402 U.S. at 13 and Green v. County School Board, 391 U.S. 430, 439 (1968), "forthwith," Swann, supra, 402 U.S at 14, "immediately," Alexander v. Holmes County Board of Education, 396 U.S 19, 20 (1969), and "at once." Alexander, supra; see Carter v. West Feliciana Parish School Board, 396 U.S. 226, 290 (1969, 1970).*/

3. The unanimous opinion of the court below was correct that the district court's denial in July 1980 of injunctive

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*/ In Alexander, the Court vacated Fifth Circuit orders postponing desegregation in the then-current school year on October 29, 1969. Subsequently, on Janaury 14, 1970, the Court vacated Fifth Circuit orders requiring adoption of plans by midyear but postponing pupil desegregation until the 1970-71 school year in Carter, supra, 396 U.S. at 291. Carter required immediate midyear pupil desegregation.

relief effective school year 1980-81 was an "'interlocutory order[ ] of serious, perhaps irreparable consequence.'" Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 480 (1978), quoting Baltimore Contractors Inc. v. Bodinger, 348 U.S. 176, 181 (1955). The appealability of the order denying injunctive relief in a school desegregation action is neither unusual or remarkable. See, e.g., Lee v. Marengo County Board., 588 F.2d 1134, 1136 (5th Cir.), cert. denied, 444 U.S. 830 (1979).

CONCLUSION

This petition for a writ of certiorari should be denied.

Respectfully submitted,

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